Supreme Court, U.S.
FILED
MAY 22 2001
CLERK

No. 00-1631

In The

Supreme Court of the United States

KINAM GOLD INC., a Delaware corporation, formerly known as Amax Gold, Inc.; AMAX GOLD, INC. SEPARATION PLAN FOR KEY EMPLOYEES; AMAX GOLD INC. BENEFITS COMMITTEE; KINROSS GOLD CORPORATION BENEFITS COMMITTEE; and KINROSS GOLD CORPORATION,

Petitioners,

v.

MARK LETTES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

In addition to the parties listed by Petitioners, two additional parties warrant mention. Kinam Gold, Inc., formerly known as Amax Gold, Inc. ("Amax"), is a subsidiary of Kinross Gold Corporation ("Kinross"), by virtue of a merger on June 1, 1998. Prior to the merger, Amax was a subsidiary of Cyprus Amax Minerals Co. ("Cyprus"); Cyprus remained a stockholder of Amax Gold, Inc. after the merger. Phelps Dodge Corporation is the successor by merger to Cyprus Amax Minerals Co.

TABLE OF CONTENTS

Page

Parties to the Proceeding and Statement Pursuant to Rule 29.6 i

Table of Contents ii

Table of Authorities iv

Statement of the Case 1

A. Factual Background 1

B. Proceedings Below 3

There Is No Compelling Reason to Grant a Writ ... 4

I. There Is No Important Federal Question of ERISA's Coverage of Employer-Sponsored Benefit Plans 4

A. ERISA Does Not Distinguish a "Plan" From a "Golden Parachute" 4

B. The Tenth Circuit Correctly Applied *Fort Halifax* 6

C. The Tenth Circuit's Ruling Affects Only These Parties 7

II. There Is No Conflict among the Circuit Courts on an Important Federal Question of ERISA Preemption 8

A. *Fort Halifax* Articulates a Clear Standard to Guide the Lower Courts 8

B. Fact-Based Decisions by Circuit Courts of Appeals Do Not Create an Important Federal Question 10

TABLE OF CONTENTS – Continued

Page

C. All ERISA Plans Are Subject to Uniform Federal Regulations 12

Conclusion 12

TABLE OF AUTHORITIES

Page

CASES

Belanger v. Wyman-Gordon Co., 71 F.3d 451 (1st Cir. 1995) 8, 9

Bogue v. AMPEX Corp., 976 F.2d 1319 (9th Cir. 1992) 9, 10, 11

Collins v. Ralston Purina Co., 147 F.3d 592 (7th Cir. 1998) 9, 10, 11

Custer v. Pan Am. Life Ins. Co., 12 F.3d 410 (4th Cir. 1993) 9

Cvelbar v. CBI Ill. Inc., 106 F.3d 1368 (7th Cir. 1997) 9

Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982) 9

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) ..*passim*

Johnston v. Paul Revere Life Ins. Co., 241 F.3d 623 (8th Cir. 2001) 8

Kulinski v. Medtronic Bio-Medicus, Inc., 21 F.3d 254 (8th Cir. 1994) 9

Marbury v. Madison, 5 U.S. 137 (1803) 5

Massachusetts v. Morash, 490 U.S. 107 (1989) 4, 5

Memorial Hosp. Sys. v. Northbrook Life Ins. Co., 904 F.2d 236 (5th Cir. 1990) 9

New England Mut. Life Ins. Co. v. Baig, 166 F.3d 1 (1st Cir. 1999) 8

Pane v. RCA Corp., 868 F.2d 631 (3d Cir. 1989) 9

TABLE OF AUTHORITIES – Continued

Page

Rice v. Sioux City Cemetary, 349 U.S. 70 (1955) 4

Schonholz v. Long Island Jewish Med. Ctr., 87 F.3d 72 (2d Cir. 1996) 8, 9, 10

Siemon v. AT&T Corp., 117 F.3d 1173 (10th Cir. 1997) 9

Tischmann v. ITT/Sheraton Corp., 145 F.3d 561 (2d Cir. 1998) 8, 9

Williams v. WCI Steel Co., 170 F.3d 602 (6th Cir. 1999) 9

Williams v. Wright, 927 F.2d 1540 (11th Cir. 1991) 9

Young v. Washington Gas Light Co., 206 F.3d 1200 (D.C. Cir. 2000) 8

STATUTES

29 U.S.C. § 1002 (1994 & Supp. 1999) 5

29 U.S.C. § 1003(b)(5) (1994 & Supp. 1999) 5

29 U.S.C. § 1051(2) (1994 & Supp. 1999) 5

OTHER AUTHORITIES

10th Cir. R. 36.1 4

10th Cir. R. 36.3 4

29 C.F.R. § 2510.3-1 (2000) 5

STATEMENT OF THE CASE

A. Factual Background

In anticipation of a merger, Amax adopted the Amax Gold, Inc. Separation Plan for Key Employees ("KESP"), effective March 5, 1997. Appellant's App. 689, 705. The KESP was unfunded, App. L-11, § 2.5, terminable at any time by Amax, and automatically terminated by December 31, 1999. App. L-15.

The KESP provided severance pay for certain "key" employees who terminated employment under specified circumstances. App. L-3, The KESP applied to nine "key" employees, including Amax's President and his direct reports, of which Lettes was one. Appellant's App. 539, ll. 17-22; Appellant's App. 720. The KESP provided for a lump sum severance payment to each "eligible" "key" employee upon a "change of control," which for practical purposes, was a merger or acquisition of Amax, App. L-3 to L-5, unless certain exceptions applied, App. L-7; App. L-25 to L-26. The amount of each "key" employee's payment was fixed by a mathematical formula, based on the employee's salary and target bonus. App. L-5, L-6, L-8.

The KESP created a "plan administrator" and appointed Amax to that position. App. L-11. Amax delegated its duties to a previously established Benefits Committee, which consisted of three officers of Amax, two of whom were "key" employees under the KESP, Appellant's App. 542, l. 24 – 543, l. 2. The Benefits Committee in turn delegated its duties to Cyprus' human resource director, Appellant's App. 541, ll. 17-22; Appellant's App. 543, l. 1 – 544, l. 4, and took no other actions under the KESP. Appellant's App. 543, l. 6 – 544, l. 10.

In March 1998, Cyprus, as Amax's majority shareholder, approved the merger agreement with Kinross, Appellant's App. 744-745; on June 1, 1998, the merger closed, Appellant's App. 523, ¶ 24. During the merger transition, Kinross offered Lettes employment, Appellant's App. 521, ¶ 17, in a position that involved a substantial diminution in at least duties and responsibilities, as well as long-term incentives, Appellant's App. 522-23, ¶ 22; Appellant's App. 760-766. Before the merger closed, Amax refused to pay Lettes severance without determining whether Kinross had offered Lettes "comparable employment", Appellant's App. 650, p. 13, ll. 2-18; Appellant's App. 654, p. 26, ll, 6-16. Lettes was terminated and separated from service as of the closing of the Kinross merger on June 1, 1998. Appellant's App. 135, ¶ 2.

Cyprus' human resource director took no part in the decision to deny Lettes' severance under the KESP, Appellant's App. 650, p. 11, ll. 17-23; for that decision, he relied on legal advice that Lettes was not eligible under the KESP until Lettes separated from service, after the merger closed, Appellant's App. 641, p. 118, ll. 2-12. Although Amax obtained general legal advice, Appellant's App. 642, p. 122, l. 5 – p. 123, l. 12, Amax did not apply this advice to any other "key" employee, Appellant's App. 596, ll. 3-20. Without documentation, Cyprus' human resource director approved the severance payments that were made under the KESP, Appellant's App. 597, l. 16-598, l. 1; those payments were made on or before the Kinross merger closed, Appellant's App. 588, l. 16 – 589, l. 7, to all "key" employees, other than Lettes, who were then employed by Amax, Appellant's App. 588, l. 16 – 589, l. 7.

Amax took no action on Lettes' request for severance after the merger closed. Appellant's App. 523 ¶ 25; Appellant's App. 754. Kinross took no action on Lettes' request before the merger closed. Appellant's App. 524, ¶ 27. There was no plan administrator for five months after the merger closed, Appellant's App. 752; Appellant's App. 682, p. 2 – 683, p. 5; Appellant's App. 686, p. 17, although Kinross was aware that Amax had paid severance benefits, because that cost was allocated to Amax, Appellant's App. 677, pp. 26, 28. Kinross belatedly appointed a plan administrator, Appellant's App. 752, and denied Lettes' severance claim, Appellant's App. 754, on the advice of Petitioners' counsel three months after Lettes filed this lawsuit, Appellant's App. 685, p. 13.

B. Proceedings Below

Lettes commenced an action in Colorado state court against Amax and Kinross, asserting common law claims and a statutory wage claim under Colorado law. Appellant's App. 8-11. Kinross removed the case to the District Court and moved to dismiss Lettes' state court complaint, solely on the basis of ERISA pre-emption. Appellant's App. 12-15. The District Court granted that motion without a hearing. App. 31a – 38a. On appeal, the Tenth Circuit reversed and remanded with instructions to remand the case to state court. App. 10a.

Neither the Tenth Circuit's decision, *see* App. 1a; nor the District Court's decisions, App. 11a; App. 31a, is reported.

THERE IS NO COMPELLING REASON TO GRANT A WRIT

This case does not present an issue that merits review by this Court. This case addresses the narrow question of whether state law or ERISA should determine whether one executive is entitled to severance pay under a "golden parachute" agreement. The Tenth Circuit's decision is a correct, unexceptional application of *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), and its Tenth Circuit progeny, and does not conflict with decisions by this Court or the decisions of any other Circuit Courts of Appeals.

The Tenth Circuit Court of Appeals issued an Order and Judgment that is not binding precedent. App. 1a; *see* 10th Cir. R. 36.3(A); *see also* 10th Cir. R. 36.1. The Tenth Circuit's Order and Judgment is limited to its facts, and is faithful to the *Fort Halifax* decision. The outcome of this case may be of paramount concern to the parties, but the case does not present issues of importance "to the public as distinguished from" the parties, *Rice v. Sioux City Cemetary*, 349 U.S. 70, 79 (1955).

There is no compelling reason for the Court to exercise its jurisdiction here.

I. THERE IS NO IMPORTANT FEDERAL QUESTION OF ERISA'S COVERAGE OF EMPLOYER-SPONSORED BENEFIT PLANS.

A. ERISA Does Not Distinguish a "Plan" From a "Golden Parachute" Agreement.

The "precise coverage" of ERISA is not "clearly set forth in the Act." *Massachusetts v. Morash*, 490 U.S. 107,

113 (1989). ERISA "covers 'employee benefit plans,' which it defines as plans that are either 'an employee welfare benefit plan,' or an 'employee pension benefit plan,' or both." *Massachusetts v. Morash*, 490 U.S. 107, 113. ERISA does not further define "plan." *See* 29 U.S.C. § 1002 (1994 & Supp. 1999). ERISA does, however, limit its coverage for unfunded "employee benefit plans," *see* 29 U.S.C. § 1003(b)(5) (1994 & Supp. 1999), particularly plans that are "maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees," 29 U.S.C. § 1051(2) (1994 & Supp. 1999).

ERISA's regulations "identify[ ] certain practices" that would not implicate ERISA's coverage, *e.g.*, 29 C.F.R. § 2510.3-1(a) (2000), but make no effort to distinguish an ERISA "plan" from an employer's agreement that does not require an "ongoing administrative program," *Fort Halifax*, 482 U.S. at 11.

Because ERISA does not "clearly" supply a definition of "plan", *Massachusetts v. Morash*, 490 U.S. at 113, the Tenth Circuit did not "contradict[ ] authoritative interpretations" of ERISA, Pet. at 8; *accord Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("[i]t is . . . the province and duty of the judicial department to say what the law is"). The Tenth Circuit correctly ruled, consistent with *Fort Halifax*, 482 U.S. at 11, that ERISA's reach is limited only to "plans" and not to mere "benefits". The Tenth Circuit simply applied the law to a specific set of facts; nothing suggests this is improper or even remarkable.

B. The Tenth Circuit Correctly Applied *Fort Halifax*.

ERISA preemption analysis is "guided by respect for the separate spheres of governmental authority preserved in our federalist system." *Fort Halifax*, 482 U.S. at 19 (citations and internal quotations omitted). Congress "intended pre-emption" only "with respect to benefits whose provision by nature requires an ongoing administrative program to meet the employer's obligation." *Fort Halifax*, 482 U.S. at 11. The requirement of a *"one-time, lump-sum payment triggered by a single event requires no administrative scheme whatsoever to meet the employer's obligation."* *Fort Halifax*, 482 U.S. at 12 (emphasis supplied). An ERISA "plan" does not exist where the employer "assumes no responsibility to pay benefits on a regular basis" and "faces no periodic demands on its assets that create a need for financial coordination and control," *Fort Halifax*, 482 U.S. at 12.

The Tenth Circuit concluded that the "hallmarks of an ERISA plan are whether the plan pays benefits triggered by several events, as opposed to a one-time event, and whether it requires regular periodic payments." App. 6a. The district court found the "key factor" to be considered was "whether a plan required a case-by-case, discretionary application of its terms." App. 7a (citations and internal quotations omitted). The Tenth Circuit "read [its] precedent, however, to require consideration of additional factors." App. 7a.

The Tenth Circuit held that whether a plan administrator "has discretion in determining eligibility for benefits" may be "one factor" that should be considered in

deciding whether "an administrative scheme . . . is necessary," App. 9a, but does not by itself resolve "whether a plan is sufficiently 'ongoing' to trigger ERISA regulation," App. 9a. The Tenth Circuit did not hold that the KESP was not "sufficiently complex" for ERISA coverage, Pet. at 15; rather, the Tenth Circuit concluded that simply because a "golden parachute" agreement purported to supply "an administrator" with "unfettered discretion in determining eligibility" for severance did not mean "that the employer has assumed a responsibility to pay benefits on a regular basis, thus causing it to face periodic demands on its assets that create a need for financial coordination and control." App. 9a (internal quotations and citations omitted).

The Tenth Circuit's holding is a straightforward application of the *Fort Halifax* "ongoing administrative program" standard, narrowly drawn to address the "undisputed" facts. Amax's "golden parachute agreement," App. 10a, was terminable at will, expired no later than December 31, 1999, App. L 15, was "unfunded, contingent on a one-time event that might never happen, and expressly limited to a narrow time period. It involved only nine employees and the benefit was to be paid in a lump sum based on a mathematical formula." App. 10a.

C. The Tenth Circuit's Ruling Affects Only These Parties.

Petitioners' argument that the Tenth Circuit's ruling endangers employees is unfounded. The Tenth Circuit's Order in this case affects only the parties. App. 1a. Of

those nine "key" employees offered the KESP, two did not receive severance payments, Lettes and another "key" employee who voluntarily terminated his employment before Kinross closed its merger with Amax, App. 4a.

II. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS ON AN IMPORTANT FEDERAL QUESTION OF ERISA PRE-EMPTION.

A. *Fort Halifax* Articulates a Clear Standard to Guide the Lower Courts.

Fort Halifax, 482 U.S. at 11, distinguished between "benefits" not subject to ERISA pre-emption and "plans" subject to ERISA, based on whether the "provision" of such benefits requires an "ongoing administrative program". This standard has furnished the Circuit Courts of Appeals with ample guidance to develop "a variety of factors," *Schonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72, 76 (2d Cir. 1996), none of which is "determinative," *Tischmann v. ITT/Sheraton Corp.*, 145 F.3d 561, 566 (2d Cir. 1998), because "no single act in itself necessarily constitutes the establishment of a plan," *Belanger v. Wyman-Gordon Co.*, 71 F.3d 451, 455 (1st Cir. 1995).

The Circuit Courts of Appeals do not lack a framework to guide ERISA pre-emption decisions. The Circuit Courts have applied, and continue to apply *Fort Halifax* to specific facts and circumstances. *See, e.g., Johnston v. Paul Revere Life Ins. Co.*, 241 F.3d 623, 629 (8th Cir. 2001) (plan must embody a set of "administrative practices"); *Young v. Washington Gas Light Co.*, 206 F.3d 1200, 1203 (D.C. Cir. 2000) (plan involves "continuing administrative and financial obligations"); *New England Mut. Life Ins. Co. v.*

Baig, 166 F.3d 1, 3 (1st Cir. 1999) ("continuing administrative or financial obligations"); *Collins v. Ralston Purina Co.*, 147 F.3d 592, 595 (7th Cir. 1998) ("ongoing administrative program"); *Tischmann*, 145 F.3d at 565 ("ongoing administrative program"); *Siemon v. AT&T Corp.*, 117 F.3d 1173, 1178 (10th Cir. 1997) ("ongoing administrative program"); *Cvelbar v. CBI Ill. Inc.*, 106 F.3d 1368, 1375 (7th Cir. 1997) ("ongoing administrative scheme to administer the plan's benefits"); *Schonholz*, 87 F.3d at 75 ("ongoing administrative program"); *Belanger*, 71 F.3d at 455 ("ongoing commitment" to provide "employee benefits"); *Kulinski v. Medtronic Bio-Medicus, Inc.*, 21 F.3d 254, 257 (8th Cir. 1994) ("separate, ongoing administrative scheme"); *Bogue v. AMPEX Corp.*, 976 F.2d 1319, 1322 (9th Cir. 1992) ("ongoing administrative program"); *Williams v. Wright*, 927 F.2d 1540, 1544 (11th Cir. 1991) ("continuing obligation necessitating ongoing . . . procedures"); *Pane v. RCA Corp.*, 868 F.2d 631, 635 (3d Cir. 1989) ("no administrative scheme"); *cf. Williams v. WCI Steel Co.*, 170 F.3d 602, 604 (6th Cir. 1999) (applying *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982), to "ERISA qualification" rather than ERISA "preemption"); *Custer v. Pan Am. Life Ins. Co.*, 12 F.3d 410, 417 (4th Cir. 1993) (applying *Donovan v. Dillingham* to determine whether health insurance plan qualified as ERISA plan); *Memorial Hosp. Sys. v. Northbrook Life Ins. Co.*, 904 F.2d 236, 241 (5th Cir. 1990) (applying *Donovan v. Dillingham* to determine whether insurance plan qualified under ERISA).

That the Circuit Courts of Appeals have relied "heavily on the specific facts of cases," Pet. at 20, in applying the *Fort Halifax* standard is expected of courts deciding justiciable cases. It is unremarkable, because the

Circuit Courts of Appeals have applied *Fort Halifax* to differing facts, that not all cases have found an employer's agreement creates an ERISA plan.

B. Fact-Based Decisions by Circuit Courts of Appeals Do Not Create an Important Federal Question.

Petitioners cite opinions from the Second Circuit, *see Schonholz v. Long Island Med. Ctr.*, 87 F.3d at 72, the Seventh Circuit, *see Collins v. Ralston Purina*, 147 F.3d at 592, and the Ninth Circuit Court of Appeals, *see Bogue v. AMPEX*, 976 F.2d at 1319, as examples of a conflict on how to determine if a severance agreement is an ERISA "plan." These cases merely illustrate the fact-specific application of the *Fort Halifax* "ongoing administrative program" standard, and each is distinguishable on its facts.

Schonholz, 87 F.3d at 76, involved a separation plan that "evidenced an ongoing commitment to provide severance benefits." The severance plan's "effective period was unlimited" and the plan was not "limited either to a single payment or to a short span of time upon a plant or office closing." 87 F.3d at 76-77. Unlike the KESP, the severance plan in *Schonholz* contemplated payments to "senior-level employees upon their involuntary discharge" at any time, 87 F.3d at 74, rather than based on a single event. The *Schonholz* plan also allowed the terminated employee to "continue to receive other benefits," 87 F.3d at 74, which contemplated ongoing administration.

Collins, 147 F.3d at 594, addressed multiple agreements, numbering as many as 60, that required the payment of "six months [sic] salary (and a year of COBRA) benefits" if the employee was terminated, apparently at any time during the plan term. Unlike the KESP, the *Collins* plan employer promised to pay, not only salary for six months, but also to pay, and presumably administer, COBRA health insurance benefits for one year after each employee was terminated. The Seventh Circuit recognized that "line drawing . . . is necessary," because "either [the] plan is preempted by ERISA or it is not." 147 F.3d at 597.

The severance plan at issue in *Bogue* involved only ten employees, but required unspecified "severance benefits" if the employer were sold and the employee was terminated, apparently at any time during the plan term. 976 F.2d at 1321. Although the Ninth Circuit in *Bogue* found it significant that the plan required individualized decision-making, 976 F.2d at 1322, the Court also found that the seller-employer "remained obligated" to make those decisions after any takeover, 976 F.2d at 1323.

The cases cited by Petitioners are necessarily limited to their facts; the Circuit Courts have reached varying results, but in doing so they have consistently employed the *Fort Halifax* rationale. These cases do not, by themselves or collectively, raise an important question for this Court's review.

C. All ERISA Plans Are Subject to Uniform Federal Regulations.

Petitioners suggest that the Circuit Courts of Appeals are unable to apply *Fort Halifax*, and consequently that employers are subject to a "patchwork scheme of regulation," *Fort Halifax*, 482 U.S. at 12. Petitioners overlook that "Congress pre-empted state laws relating to *plans*, rather than simply to *benefits*," *Fort Halifax*, 482 U.S. at 11, because only a "plan embodies a set of administrative practices vulnerable to the burden that would be imposed" by conflicting state and federal regulations, *Fort Halifax*, 482 U.S. at 11. Where, as here, that "concern" does not "arise[ ]," because supplying a benefit does not require "an ongoing administrative program," *Fort Halifax*, 482 U.S. at 11, no ERISA plan is created. When no ERISA plan exists, the fact that a 'golden parachute' severance agreement is subject to state law claims and remedies is not an important federal question.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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